

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Qwest Communications)	
International, Inc.)	
)	
Consolidated Application for Authority)	WC Docket No. 02-148
To Provide In-Region, InterLATA Services in)	
Colorado, Idaho, Iowa, Nebraska)	
and North Dakota)	
)	
Consolidated Application for Authority)	WC Docket No. 02-189
To Provide In-Region, InterLATA Services)	
in Montana, Utah, Washington and Wyoming)	

SUPPLEMENTAL COMMENTS OF TOUCH AMERICA, INC.

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QWEST 271 APPLICATIONS
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SUPPLEMENTAL COMMENTS OF TOUCH AMERICA, INC.

Pursuant to the Commission’s August 29, 2002 Public Notice in the above-referenced proceedings, DA 02-2129, Touch America, Inc. (“Touch America”) hereby submits its comments on the recent *ex parte* submissions of Qwest Communications International, Inc. (“Qwest”) regarding Qwest’s ongoing analysis of its accounting policies and practices (“*ex parte filings*”).¹

¹ See Letter from Douglas A. Klein, Qwest, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket Nos. 02-148 and 02-189 (August 28, 2002)(“Qwest August 28 *Ex Parte* Letter”); Letter from R. Steven Davis, Qwest, to Marlene H. Dortch, Secretary Federal Communications Commission, CC Docket Nos. 02-148 and 02-189 (August 26, 2002) (“Qwest August 26 *Ex Parte* Letter”); Letter from Oren G. Shaffer, Vice Chairman and Chief Financial Officer, Qwest Communications International Inc. to Marlene H. Dortch, Secretary Federal Communications Commission, CC Docket Nos. 02-148 and 02-189 (August 20, 2002)(“Qwest August 20 *Ex Parte* Letter”).

I. INTRODUCTION AND SUMMARY

In its *ex parte filings*, Qwest seeks to update and correct information contained in its 271 Applications² related to Qwest's compliance with generally accepted accounting principles ("GAAP"). Qwest's *ex parte filings*, however, are just another example of Qwest asking the Commission to put aside Qwest's history of unlawful and anticompetitive behavior and – on the promise that Qwest is *now* ready to comply with the law on a going forward basis – approve its Applications.

As with Qwest's recently offered proposal to address its secret agreements³, Qwest's Applications were to be complete when filed, not modified on the eve of the statutory deadline in an attempt to assuage opposition or, certainly, to rescind representations of compliance with the law. Instead, at the time Qwest filed its Applications, they were not complete. Moreover, until such time as Qwest has completed its review of its accounting policies and the full extent and effect of its restatement is known, the Commission is unable to determine whether Qwest is truly in compliance with its 272 obligations or whether it will comply with its section 272 obligations in the future. Qwest also focuses on its obligations under section 272 of the Act despite the fact that Qwest tacitly admits that it has been violating section 271 of the Act for the past two years.⁴

² See Application of Qwest Communications International Inc. for Authorization to Provide In-Region, InterLATA Services in the States of Colorado, Idaho, Iowa Nebraska and North Dakota (WC Docket No. 02-148) and Application of Qwest Communications International Inc. for Authorization to Provide In-Region, InterLATA Services in the States of Montana, Utah, Washington and Wyoming (WC Docket No. 02-189)(collectively "Applications").

³ See Public Notice, WC Dkt. No. 02-148 (August 21, 2002).

⁴ See Qwest Press Release, "Qwest Communications Provides Current Status of Ongoing Analysis of its Accounting Policies and Practices," www.qwest.com/about/media/pressroom (July 28, 2002)("Restatement Announcement").

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In short, Qwest's *ex parte filings* do nothing more than demonstrate once again that its Applications were not complete when filed. The *ex parte filings* also raise more questions than answers and otherwise completely fail to demonstrate that Qwest has and will comply with section 272. When coupled with the reasons set forth in the Oppositions and Replies of Touch America in these matters, as well as the Oppositions and Replies of other interested parties, the Commission must deny the Applications.

A. Qwest's *Ex Parte* submissions continue to demonstrate that it has not met the statutory requirements of sections 271 and 271 and therefore its Applications must be denied.

As part of its determination as to whether Qwest should be permitted to provide in-region, interLATA services, the Commission must find that the 271 authorization "will be carried out in accordance with the requirements of section 272."⁵ Section 272 and the Commission's implementing regulations require a Bell Operating Company (here, Qwest Corporation or "QC") and its 271 affiliate (Qwest Communications Corporation or "QCC") to maintain their books, records and accounts in accordance with GAAP. Qwest states, however, that contrary to its prior representations, it is not currently able to certify that the financial statements of QC or QCC are accounted for consistently with GAAP⁶ and modifies the declarations supporting its Applications accordingly.⁷ At the time that Qwest filed its Applications, therefore, Qwest did not meet the requirements of section 272(b)(2) of the Act and

⁵ 47 U.S.C. § 271(d)(3)(B).

⁶ See Qwest's August 20 *Ex Parte* Letter at 2.

⁷ See Qwest's August 26 *Ex Parte* Letter at 4; Qwest's August 28 *Ex Parte* Letter.

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its *ex parte filings* have not cured that failure.⁸ Consequently, on that basis alone Qwest's Application must be denied.

In an effort to minimize this clear deficiency in its Applications, Qwest argues that the Commission should nevertheless approve its Applications because the transactions between QCC and QC have been accounted for in accordance with GAAP as required by section 272(c)(2).⁹ Not only is Qwest asking that the Commission therefore overlook the fact that it has violated and continues to violate section 272(b)(2) but Qwest is also asking the Commission to accept the bare assertion that the transactions between QC and QCC have been conducted in accordance with GAAP even though Qwest has a "comprehensive analysis underway"¹⁰ with respect to the nature and significance of its restatement. The Commission must await the outcome of the analysis before making any determination as to Qwest's compliance with its statutory obligations. In fact, it is incredulous to believe that Qwest somehow accounted for intercompany transactions in accordance with GAAP but not the books and records of those companies.

Through its *ex parte filings*, Qwest is essentially asking the Commission to put aside Qwest's past and buy into its promise of future compliance. As Qwest acknowledged, however, "Section 272 involves a 'predictive judgment regarding the future behavior of the BOC.'"¹¹

⁸ Qwest admits as much when it states that "QCC's obligations under section 272(b)(2) are "subject to the restatement of financial reports," Qwest's August 26 *Ex Parte* Letter at 3 referring to Qwest's August 26 *Ex Parte* Letter, but Qwest also states that as a result of the change in auditors and the ongoing investigation by the U.S. Securities and Exchange Commission, it "cannot state with certainty when a restatement will be completed." Qwest Press Release, "Qwest Communications Reports Second Quarter 2002 Results; Achieves Positive Free Cash Flow; Revises Guidance For Remainder Of 2002," www.qwest.com/about/media/pressroom/1,1720,1087_archive,00.html (August 8, 2002.)

⁹ See Qwest's August 26 *Ex Parte* Letter at 2; Qwest's August 20 *Ex Parte* Letter at 2.

¹⁰ See Qwest's August 26 *Ex Parte* Letter at 4.

¹¹ *Id.*

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Based on Qwest's history and its restatement of earnings, the Commission clearly cannot predict with any certainty that Qwest has or will abide by the requirements of Section 272 of the Act.

Moreover, as with Qwest's 11th hour proposal related to its future compliance with filing carrier agreements,¹² Qwest's last minute modifications to the declarations supporting its Applications violate the Commission's "complete when filed" policy. This time, however, Qwest is not even supplementing its Applications in an attempt to make it more palatable to regulators or competitors but, instead, is detracting from its original Application; *i.e.*, disclaiming compliance with specific statutory requirements to which it had previously represented compliance. Clearly, this type of modification does not support the Commission's waiver of its "complete as filed" doctrine.

B. By focusing on its compliance with section 272, Qwest wholly ignores the fact that it has admitted to violating section 271 of the Act.

In its efforts to clarify the effect of its recent accounting announcements on its Applications, Qwest focuses exclusively on its compliance with section 272. Qwest ignores the fact that, through its Restatement Announcement – where Qwest disclosed that it improperly applied revenue recognition policies for optical capacity (*i.e.*, Indefeasible Rights of Use, or "IRU") transactions totaling approximately \$1.16 billion – Qwest effectively admitted that it has been violating section 271 for over two years. That is, although Qwest has claimed that its "lit capacity IRU" agreements are asset sales (*i.e.*, a sale of facilities), not telecommunications services,¹³ in its Restatement Announcement Qwest revealed that it has "in some cases applied

¹² *Supra*, note 3.

¹³ This argument, of course, is of itself contrived. Section 271 of the Act prohibits "in-region, intraLATA services." The Act, in turn, defines such services as "telecommunications" and "telecommunications" is defined as a "transmission." 47 USC Sections 3(21) and 3(43), respectively.

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its accounting policies incorrectly with respect to certain optical capacity asset sale transactions in 1999, 2000 and 2001”; in particular, that, in some instances, the “optical capacity asset sales” should have been “instead treated as operating leases or services contracts.”¹⁴ Qwest thereby admits that it has been violating section 271 through the sale of its contrived concept of “lit capacity IRUs,” which are, in fact, nothing more than the provision of in-region, interLATA services.¹⁵ Because Qwest has been violating section 271, its Applications must be denied.

II. CONCLUSION

Qwest has failed to meet the requirements for obtaining approval under section 271 of the Act. In this instance, the failure is of particular concern because section 272 was meant, among other things, to prevent the ills of cross-subsidization and discrimination between a BOC and its affiliate. Cross-subsidization whereby a BOC overstates its costs and rates in order to fund its competitive affiliate that can understate its costs and rates is particularly insidious because it hurts both the ratepayer of the BOC and the competitor of the affiliate. Discrimination in favor of either company also affects both parties. In the end, only the BOC and the affiliate benefit but to the detriment of everyone else. Without the tools of GAAP and the certification that books and record were kept in accordance with GAAP, the Commission and, for that matter, all interested parties, are denied the ability to detect the presence of either ill and thereby prevent

Thus, whether an offering is an IRU or a service is irrelevant; it only matters that it is a transmission between LATA boundaries that originates in the operating region of Qwest. As defined by Qwest in one of its typical lit capacity agreements, “‘capacity’ means the digital transmission capability of a given portion of the Qwest Network...” In other words, Qwest IRU Agreements are for transmission that originates in-region and crosses LATA boundaries.

¹⁴ See Restatement Announcement at 1-2.

¹⁵ Although Qwest may claim that the Restatement Announcement, Qwest denies that it makes such an admission. It may be true that the Restatement Announcement does not explicitly state that “Qwest admits” but it is clear that a plain reading of that announcement, as quoted above, is tantamount to an

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their anticompetitive effects. Given the importance of section 272 to the competitive process, the Commission cannot rely on Qwest's promises of future compliance, particularly in light of Qwest storied past. As of this writing, Congress, the Securities and Exchange Commission and the Department of Justice are all looking into Qwest and its nefarious financial activities. On that basis alone, the Commission should not give Qwest the benefit of the doubt but must deny the Applications until such time as Qwest can demonstrate – not merely assert – compliance with the law.

admission.

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September 4, 2002

CERTIFICATE OF SERVICE

I, Jane L. Hall, do hereby certify that on this 4th day of September, 2002, a copy of the foregoing Supplemental Comments filed on behalf of Touch America, in Docket Nos. 02-148 and 02-189, was served by U.S. Mail, postage prepaid, to the parties on the attached service list.

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